APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 67,494

ACM 28760

UNITED STATES,

Appellee

v.

DONALD R. BURKS, JR., Master Sergeant
U.S. Air Force,

Appellant

Argued November 4, 1992

Decided APR 29 1993

Counsel

For Appellant: *Captain George F. May* (argued); *Major Alice M. Kottmyer* (on brief); *William J. Holmes, Colonel Jeffrey R. Owens, Lieutenant Colonel Terry J. Woodhouse.*

For Appellee: *Lieutenant Colonel Jeffrey T. Infelise* (argued); *Lieutenant Colonel Brenda J. Hollis, Major Morris D. Davis, Captain David C. Wesley* (on brief); *Colonel Richard L. Purdon* and *Major Paul H. Blackwell, Jr.*

Military Judge: Michael B. McShane

Opinion of the Court

WISS, Judge:

A general court-martial with officer members tried appellant for premeditated murder and aggravated assault, *see* Arts. 118 and 128, Uniform Code of Military Justice, 10 USC §§ 918 and 928, respectively. After a contested trial, the members convicted appellant of unpremeditated murder and aggravated assault, and sentenced him to a dishonorable discharge, confinement for life, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Court of Military Review unanimously affirmed them in an unpublished opinion dated August 26, 1991.

On appellant's petition, this Court granted review of four issues, three of which address evidentiary questions at trial and the fourth concerns multiplicity of his two convictions for sentencing purposes. Now, after further review, we affirm.

On the morning of September 25, 1989, Sergeant Handy was savagely beaten to death by repeated blows to and about his head while working alone on a night shift in the civil engineering service-call office. Behavioral Analysis Interviews by agents of the Office of Special Investigations (OSI) narrowed the list of possible suspects to about twelve, including appellant. A number in that group agreed to take polygraphs; appellant's result was interpreted as deceptive on some critical questions, so he then "became a suspect."

Over the next 2½ days, appellant voluntarily submitted himself to interrogation by OSI agents on repeated occasions and consented to searches of his house, car, gym locker and bowling alley locker. Ultimately, appellant confessed to killing Handy by numerous blows with an aluminum baseball bat. Appellant followed his oral confession with "his own typed version," which then was

"expanded upon in a second type[d] confession" that appellant signed.

Appellant's confessions reflect outrage at Handy's alleged admission to having molested a young girl and his alleged bragging that he was getting away with it. Appellant apparently decided to beat Handy to scare him into not repeating such conduct. After he had beaten him with the bat in Handy's office, appellant "escorted" him to the men's bathroom to assist Handy in cleaning up the blood; however, once there, he initiated a second beating that killed Handy.

Three days later, appellant "recanted his confession[s]" and claimed that OSI agents had induced him into making them. In their stead, he claimed that three men with "stars painted on their cheeks and earrings in their right ears" had "forced him to" take them to where Handy worked, where two of them beat him to death with a bat and an unusual weapon of some sort. He stated that they threatened to injure his children if he mentioned any word of this assault for 4 weeks. Unpub. op. at 2.

With this brief evidentiary background, we can proceed to consider appellant's complaints of error.

I

WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APELLANT BY EXCLUDING EXCULPATORY EVIDENCE THEREBY DENYING APPELLANT HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

A

About 2 months after appellant had recanted his confessions, security police found a 16-page, handwritten letter under the brake pedal of an unlocked van that had

been used to transport prisoners. The letter was addressed to appellant and was signed by "Michael," who claimed that he had been Handy's "homosexual lover." Unpub. op. at 3.

According to an OSI transcription of the letter, which has been stipulated to as authentic, "Michael" explained that he had written because he wanted appellant "and all Joseph's [Handy's] friend [sic] to know the truth about Joseph and why he died." This "truth" was that Handy, through "Michael," had become entwined in a cult "family" that was involved with drugs and child sex; Handy purportedly never had engaged in such activities himself and had, instead, gathered a "package" of incriminating information to turn over to officials. "Michael" revealed: "Joseph was sacrificed by the family because he was going to betray our father [the leader of the cult] by turning over information to the air force official [sic] just to clear his name. Our brother in faith brother Rodriguez and brother Martinez and brother Williams was [sic] told by our father in faith to kill Joseph and get the information he had about our family." "Michael" also mentioned unusual trademarks of such an assassination by the "family," such as a weapon with "a star on it" and the assassin wearing a star on his or her right cheek.

Appellant had ridden in the van the morning that the letter was found, but he had ridden in the back seat with other prisoners and had been handcuffed. Authorities were unable to determine who had written the note or how it had been placed in the van. Further, the letter indicated that "Michael" also had "written letter [sic] to the local newspapers and Air Force authorities explaining everything that happen [sic] and why. I sent Air Force authorities a list of names and numbers also a map." Notwithstanding, no additional communications from "Michael" ever came to light.

B

The defense indicated from the outset of trial that its theory of the case was that a homosexual cult, not appellant, had killed Handy and that appellant had confessed only to protect his children from the threatened harm to them if he talked within a month of the incident. Although the defense relied upon various items of evidence and testimony to support this theory, the two principal pillars upon which it was to be built were appellant's own testimony to this effect and the letter from "Michael."

Accordingly, prior to trial, appellant moved to admit, *inter alia,* "Michael's" letter. Defense counsel offered four bases for admission: constitutional due process; Mil.R. Evid. 804(b)(3), Manual for Courts-Martial, United States, 1984, statement against interest; Mil.R.Evid. 804 (b)(5), residual hearsay exception where declarant is unavailable; and Mil.R.Evid. 803(24), residual hearsay exception where the declarant's availability is immaterial. Assistant trial counsel objected, contending that there was no assurance at all that this hearsay evidence was trustworthy.

After spirited litigation, the military judge denied the motion. As to Mil.R.Evid. 804(b)(3), the military judge noted that such statements "are not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statements." He concluded that he did "not find a clear indication of trustworthiness of the statement in this case. The fact that some of the details in the statement are true does not serve to validate the entire statement. The fact that the declarant is unknown makes it impossible to attach any credibility or trustworthiness to the statement."

The military judge applied the same analysis to the requirements of Mil.R.Evid. 803(24) and 804(b)(5), each of which requires "equivalent circumstantial guaran-

tees of trustworthiness" as are found in the specific hearsay exceptions. He determined that "there is absolutely no way to test the trustworthiness of what amounts to an anonymous statement, a statement by an unknown author." He similarly rejected the argument that constitutional due process required admission of the letter: "The statement has none of the persuasive assurances of trustworthiness found by the Supreme Court in *Chambers versus Mississippi*[, 410 U.S. 284 (1973)]."

In sum, as to all four bases urged by the defense, the military judge's conclusion is best reflected by the following comment: "This anonymous letter does not even come close to the threshold requirements for trustworthiness and reliability." Furthermore, as a final point, the military judge applied the standard of Mil.R.Evid. 403 and found "that any possible probative value of this statement is substantially outweighed by the danger of confusion of the issues in the case. This application of M.R.E. 403 also leads me to conclude that the statement will not be admitted."

C

In this Court, as he did in the Court of Military Review, appellant continues to urge the same bases for admissibility of the letter.[1] To support his burden as the profferer of the hearsay evidence to show that the letter comes within an exception to the rule excluding hearsay, *see* Mil.R.Evid. 802, appellant has pointed to a number of factors that he contends are circumstances assuring trustworthiness, *see* Mil.R.Evid. 803(24) and 804(b)(3) and (5). We are not persuaded.

Each of the factors urged by appellant seems to fall into one of three general categories. First, appellant

[1] The granted issue, raised by appellant, appears to be more restricted in its theory of error; since appellant argues all four bases in his brief, however, we will consider them.

argues that certain "statements in the letter are factually correct." Final Brief at 14. For instance, the letter states that Handy's "father was deceased" and that his brother had been killed, as well as that Handy had been "under investigation for child molestation." Notwithstanding their claimed truth, none of these factors was outside the realm of possible knowledge of any number of people, including appellant. Indeed, in his confessions made 2½ days after Handy's murder, appellant unequivocally revealed his awareness that Handy had been a suspected child sexual abuser. Moreover, as Handy's supervisor and co-worker, appellant could reasonably be expected to know certain highlights of Handy's family history.

Second, certain events or other statements in the letter "are corroborated by other evidence." Final Brief at 15. The letter, for instance, describes the lethal weapon as one with a star on it and indicates that more than one person was involved in the murder. In comparison, other evidence of record indicates that some of the blows to Handy may have been delivered by some weapon other than a baseball bat—which was the only murder weapon recovered—and that a bloody shoeprint on Handy's chest did not match any of the footwear found in appellant's quarters—permitting the inference that someone other than or in addition to appellant was involved.

Neither these examples nor other "corroboration" urged by appellant are particularly telling, however. For instance, appellant's own recantation 2 full months before the letter was found mentioned killers associated in various ways with stars and that the killers had used a bat and some other "unique weapon." Unpub. op. at 2. As to the shoeprint, the Government appropriately suggests that appellant could easily have disposed of his bloody shoes after murdering Handy. Answer to Final Brief at 5. In other words, any coincidence between statements in the letter and other evidence is not necessarily probative